AFFIRMED and Opinion Filed June 22, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00497-CV

TUNAD ENTERPRISES INC., Appellant
V.
MARTIN PALMA D/B/A LIZ PIZZA, Appellee

On Appeal from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-00618-2016

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

In this landlord-tenant dispute, the trial court granted summary judgment for appellee Martin Palma d/b/a Liz Pizza, the tenant. In four issues, appellant Tunad Enterprises Inc., the landlord, contends the trial court erred by (1) striking its motion to dismiss as untimely, (2) denying its no-evidence motion for summary judgment, (3) granting summary judgment for the tenant, and (4) striking its answer for failure to respond to certain discovery requests. We affirm the trial court's judgment.

BACKGROUND

Tenant[1] leased space from Landlord in a commercial building in 2010 and paid the $3,500 security deposit required by the lease. When the lease expired in 2015, Tenant vacated the premises and surrendered possession to Landlord. Landlord did not return the security deposit and did not provide a written description or itemized list of deductions taken from Tenant's deposit. In 2016, Tenant sued Landlord and its principal, Olatunde R. Adio, for return of the security deposit and for failure to provide an accounting as required by Chapter 93 of the Texas Property Code. Although the petition's caption showed only "Martin Palma d/b/a Liz Pizza" as the plaintiff, the body of the petition identified Adelaido Cruz as the plaintiff. Further references in the petition were to "Plaintiff" or "Tenant." A copy of the lease agreement was attached to the petition.

The trial court initially rendered a default judgment against Landlord. Landlord filed an appeal but did not file a supersedeas bond. While the appeal was pending, Tenant served discovery on Landlord in aid of the judgment. After a series of motions, hearings, and a petition for writ of mandamus to this Court,[2] the trial court (1) set Landlord's supersedeas bond at zero, and (2) granted the motion to

[1] For clarity we refer to appellant as "Landlord" and appellee as "Tenant" except when discussing issues challenging Adelaido Cruz's individual capacity.

[2] *See In re Tunad Enters., Inc.*, No. 05-17-00930-CV, 2017 WL 4053941, at *3 (Tex. App.—Dallas Sept. 14, 2017, orig. proceeding) (mem. op.) (conditionally granting petition in part and denying in part).

compel. Landlord then filed for bankruptcy, but several months later, agreed to lift the automatic stay to allow this suit to proceed.

The default judgment was subsequently reversed on appeal and the case was remanded to the trial court for further proceedings. *See Tunad Enters., Inc. v. Palma*, No. 05-17-00208-CV, 2018 WL 3134891, at *6 (Tex. App.—Dallas June 27, 2018, no pet.) (mem. op.). Landlord filed a no-evidence motion for summary judgment on the ground that Cruz lacked capacity to bring suit. Tenant filed a motion for summary judgment on its claim for failure to return the security deposit. After Landlord filed three additional unsuccessful mandamus petitions in this Court,[3] the trial court (1) denied Landlord's motion for summary judgment, (2) granted Tenant's motion for summary judgment, (3) struck Landlord's answer, and (4) rendered judgment for Tenant. This appeal followed.

STANDARDS OF REVIEW

We review the trial court's ruling on a motion to dismiss under rule 91a de novo. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam). We review a trial court's ruling on a motion to compel discovery for abuse of discretion. *See Carbonara v. Tex. Stadium Corp.*, 244 S.W.3d 651, 655 (Tex. App.—Dallas

[3] *In re Tunad Enters., Inc.*, No. 05-18-00980-CV, 2018 WL 4346566, at * 1 (Tex. App.—Dallas Sept. 12, 2018, orig. proceeding) (mem. op.) (mandamus denied) (seeking attorney's fees for prior mandamus proceeding and challenging trial court's verbal rulings); *In re Tunad Enters., Inc.*, No. 05-18-01157-CV, 2018 WL 4959418, at *1 (Tex. App.—Dallas Oct. 15, 2018, orig. proceeding) (mem. op.) (mandamus denied) (challenging sanctions order and trial court's jurisdiction); *In re Tunad Enters., Inc.*, No. 05-18-01336-CV, 2018 WL 6845251, at *1 (Tex. App.—Dallas Nov. 16, 2018, orig. proceeding) (mem. op.) (mandamus and rehearing en banc denied) (challenging denial of Landlord's rule 91a motion to dismiss).

2008, no pet.). We review summary judgments de novo under well-established standards. *See Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018) (per curiam). When both parties move for summary judgment and the trial court grants one motion and denies the other, we will consider all questions presented and render the judgment the trial court should have rendered. *Dallas Cent. Appraisal Dist. v. Mission Aire IV, L.P.*, 279 S.W.3d 471, 473–74 (Tex. App.—Dallas 2009, pet. denied).

We review a trial court's imposition of sanctions under an abuse of discretion standard. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014). We may reverse the ruling "only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). The trial court does not abuse its discretion if it bases its decision on conflicting evidence and some evidence supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). In reviewing sanctions orders, we are not bound by the trial court's findings of fact and conclusions of law; instead, we independently review the entire record to determine whether the court abused its discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam). And because the ultimate sanction imposed here was striking Landlord's answer, we also consider whether Landlord's conduct justified the presumption that its claims or defenses lacked merit. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 184 (Tex. 2012). ("Thus, a death-penalty sanction cannot be used to adjudicate the merits of claims or defenses

unless the offending party's conduct during discovery justifies a presumption that its claims or defenses lack merit.").

DISCUSSION

Disposition of Landlord's issues depends on the answers to two preliminary questions: first, whether the February 1, 2019 "Summary Judgment" or the February 21, 2019 "Judgment" is the final judgment from which this appeal arises, and second, whether the sanctions imposed on Landlord—ultimately the striking of Landlord's answer—were appropriate.

1. Final Judgment

The trial court signed an order entitled "Summary Judgment" on February 1, 2019, and a "Judgment" on February 21, 2019. Most notably, the February 21 Judgment contains an award of sanctions in the amount of $10,000 that is not included in the trial court's February 1 Summary Judgment order as well as a finding that Landlord retained Tenant's security deposit in bad faith. Relying on language in the February 1 order that Tenant's claim against Olatunde R. Adio is severed and assigned a new cause number "making the judgment granted herein final in all respects," Landlord argues that the February 1 order is the final judgment in this case.

But "[a] trial court retains jurisdiction over a case for a minimum of thirty days after signing a final judgment." *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000) (citing TEX. R. CIV. P. 329b(d)). "During this time,

the trial court has plenary power to change its judgment." *Id.* (citing *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988) (per curiam)). Consequently, we conclude that the trial court's February 21 Judgment is the final judgment we review in this appeal. TEX. R. CIV. P. 329b(d) (trial court "has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed").

2. Sanctions

In its fourth issue, Landlord argues the trial court abused its discretion for striking its answer for failure to respond to discovery in aid of judgment "when it is very clear that there was no judgment to conduct discovery on." The trial court's initial order granting Tenant's motion to compel discovery was signed before this Court reversed the 2016 default judgment. Tenant responds that the discovery was proper in light of Landlord's claim that its supersedeas bond should be set at zero, and after this Court's reversal of the default judgment, was relevant to claims in Tenant's amended petition that Landlord made fraudulent transfers and denuded the corporation of assets in order to avoid its obligation to return Tenant's security deposit and pay statutory damages. *See* TEX. PROP. CODE § 93.011 (liability of landlord).

A trial court may strike a party's pleading as a discovery sanction—sometimes referred to as a death-penalty sanction—for abuse of the discovery process. *See* TEX. R. CIV. P. 215.2(b)(5), 215.3. As we have explained, we review the trial court's

decision for abuse of discretion. *See Nath*, 446 S.W.3d at 361; *Unifund CCR Partners*, 299 S.W.3d at 97. In reviewing whether the trial court abused its discretion, we determine whether there is a direct relationship between the offensive conduct and the sanction imposed, and whether the imposed sanction is excessive. *See TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding). And as we have also explained, the offending party's conduct must justify a presumption that its claims or defenses lack merit. *See Paradigm Oil, Inc.*, 372 S.W.3d at 184.

The trial court's order striking Landlord's answer, dated the same day as the final judgment, reflects that the particular conduct warranting sanctions was Landlord's repeated failure to comply with the court's prior orders. The order details Landlord's failure to comply with an order to produce specific documents by February 1, 2019, and to pay previously-awarded sanctions of $10,000.

The record also reflects that the order was the culmination of a series of orders signed after numerous motions and hearings both before and after the default judgment was reversed. The trial court considered, and reconsidered, its orders on Tenant's motions to compel, withdrawing orders of July 5, 2017, and September 26, 2017, making new orders both before and after the default judgment reversal and this Court's order to rule on Landlord's motion to set a supersedeas bond, and denying Tenant's repeated requests to strike Landlord's answer in the months after the remand. The orders set new deadlines for production of documents and

Landlord's deposition and ordered payment of Tenant's attorney's fees related to Tenant's motions to compel. An order of September 12, 2018 recites additional misconduct including that Landlord stopped payment on a check to Tenant for previously-ordered sanctions after a hearing in which Landlord represented to the court that the sanctions had been paid. The reporter's record reflects that Landlord retained new counsel immediately before a hearing in January 2019, and the trial court again gave Landlord additional time—although short—to comply with a previous order to produce documents by September 13, 2018. In short, the trial court gave Landlord repeated opportunities to comply with its orders over the course of eight months after this Court's remand before granting Tenant's motions to strike Landlord's answer.

We conclude the trial court did not abuse its discretion. The court held hearings, considered Landlord's objections to the discovery and overruled them, reconsidered its orders, and attempted lesser sanctions before striking Landlord's pleadings. The record also reflects that the trial court heard testimony from the parties on several occasions and had the opportunity to observe their credibility. It was within the trial court's discretion to determine that the information sought was relevant to Tenant's claims that Landlord and its individual principal, also a defendant, fraudulently transferred assets and denuded the corporation to avoid its obligation to refund Tenant's security deposit. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (per curiam) (orig. proceeding) (scope of discovery is

largely within trial court's discretion); *see also Nw. Cattle Feeders, LLC v. O'Connell*, 554 S.W.3d 711, 729 (Tex. App.—Fort Worth 2018, pet. denied) ("denuding" theory allows for defendant's personal liability for corporation's obligations when defendant has stripped corporation of assets that corporation could have used to pay creditor or claimant; liability of individual defendant is derivative of corporation's for some obligation).

We decide Landlord's fourth issue against it.[4] Having reached this conclusion, we consider Landlord's remaining challenges to the trial court's rulings.

3. Motion to dismiss

In its first issue, Landlord contends the trial court erred as a matter of law by striking its rule 91a motion to dismiss as untimely. Landlord argues that it filed the motion within eleven days of discovering that Palma was not involved in the lawsuit and that Cruz lacked standing to sue.

A motion to dismiss under rule 91a must be filed "within 60 days after the first pleading containing the challenged cause of action is served on the movant."

[4] Our review of the entire record includes the trial court's consideration of Landlord's allegation that Tenant made misrepresentations to the trial court about the assignment. This matter was the subject of at least one hearing before the trial court on a motion by Landlord for sanctions. The trial court denied the motion. Each party alleged sanctionable conduct by the other, and the trial court could observe credibility and demeanor of the parties and their counsel at the numerous hearings held on these matters. The record reflects the trial court's careful consideration of these matters after giving each party multiple opportunities to be heard. Despite Landlord's allegations, after our review of the entire record, we cannot say the trial court abused its discretion in concluding that Landlord's conduct during discovery justified a presumption that its claims or defenses lacked merit. *See Paradigm Oil, Inc.*, 372 S.W.3d at 184 (death-penalty sanction cannot be used to adjudicate merits unless offending party's conduct during discovery justifies presumption that its claims or defenses lack merit).

TEX. R. CIV. P. 91a.3(a). The original petition in this case was filed on February 11, 2016. Under section B, "Parties," the plaintiff is identified as Adelaido Cruz. The cause of action for breach of the lease by failing to return the security deposit is expressly pleaded, and a copy of the lease is attached. Consequently, it was apparent on the face of the petition that Cruz was asserting a claim against Landlord for breach of the landlord-tenant relationship. Landlord filed an answer to the petition. *See Tunad Enters., Inc.*, 2018 WL 3134891, at *5 ("We conclude Adio's March 26, 2016 letter constituted an answer on behalf of Tunad.").

Landlord filed its "Motion to Dismiss Baseless Cause of Action" on September 17, 2018, more than two years later.[5] In the motion, Landlord alleged that it received plaintiff's amended petition on September 11, 2018, showing Cruz as the sole plaintiff. Landlord argued that Cruz's claims had no basis in law or fact because he was "neither a party nor an intended third party beneficiary of the lease agreement between Martin Palma d/b/a Liz Pizza and Tunad Enterprises, Inc." Landlord argues that it filed its rule 91a motion "within 12 days of Cruz's attorney['s] confession that he does not represent plaintiff Martin Palma and Cruz's filing of his First Amended Petition," and also argues that equitable estoppel should apply to extend the rule 91a

[5] Landlord also argues that it could not file its 91a motion while the case was pending on appeal. But even if the rule 91a deadline ran from June 27, 2018, the date of this Court's remand—a matter we do not decide here—Landlord's motion filed on September 17, 2018, was untimely under rule 91a. *See* TEX. R. CIV. P. 91a.3(a) (motion to dismiss must be filed "within 60 days after the first pleading containing the challenged cause of action is served on the movant").

deadline because "Cruz and his attorneys actively concealed that Cruz is the sole plaintiff." As Landlord recognizes, however, the court must decide a rule 91a motion based solely on the pleadings. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018) ("except in determining attorney's fees, 'the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59'" (quoting TEX. R. CIV. P. 91a.6)).

Plaintiff's First Amended Petition contains the same caption and the same identification of the parties—alleging that Cruz is the plaintiff—as the original petition filed more than two years earlier. It asserts the same cause of action—failure to return the security deposit or provide the written list of deductions the Property Code requires—as the original petition. *See* TEX. PROP. CODE §§ 93.005 (obligation to refund security deposit), 93.006 (required accounting), 93.011 (liability of landlord). It attaches the same document—the Lease showing "Martin Palma dba Liz Pizza" as tenant—as the original petition.

Consequently, Landlord's motion to dismiss was not filed "within 60 days after the first pleading containing the challenged cause of action [was] served on the movant." TEX. R. CIV. P. 91a.3(a). Because Landlord's motion to dismiss was not timely, the trial court did not err by denying it. We decide Landlord's first issue against it.

4. Landlord's motion for summary judgment

In its second issue, Landlord contends the trial court should have granted its no-evidence motion for summary judgment because Cruz did not produce any evidence of his capacity to sue. Landlord argues that "the purported assignment to Cruz is void on each of two separate legal grounds," that (1) Palma revoked the assignment by naming himself as plaintiff in this suit, and (2) the lease contains an anti-assignment clause. Landlord also argues that the assignment was fraudulent in any event.

A party's lack of capacity is an affirmative defense that must be raised in the trial court by a verified pleading. *See* TEX. R. CIV. P. 93(1)–(2); *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003). Although Landlord filed a verified answer that included a denial that Cruz had capacity to sue, the trial court struck Landlord's answer for failure to respond to discovery and failure to pay previously-ordered sanctions, as we have already discussed. Due to the striking of its answer, Landlord had no pleading asserting the affirmative defense of lack of capacity. Accordingly, the defense was waived. *See G.R.A.V.I.T.Y. Enters., Inc. v. Reece Supply Co.*, 177 S.W.3d 537, 544 (Tex. App.—Dallas 2005, no pet.) (holding that limitations defense was waived because, once party's amended pleading was struck, "it had no pleading asserting the affirmative defense of limitations").

Landlord argues that rule 166a(c) required the trial court to decide its motion based on the pleadings on file on the date of the hearing; Tenant did not properly

plead assignment until after the date of the hearing and did not seek leave of court before doing so; and Landlord's answer had not been stricken at the time of the hearing. *See* TEX. R. CIV. P. 166a(c) (summary judgment is rendered on pleadings and other specified documents "on file at the time of the hearing, or filed thereafter and before judgment with permission of the court"). We reject these arguments for two reasons. First, although Landlord objected in writing to the filing of Tenant's second amended petition after the hearing, Landlord did not obtain a ruling on its objection. *See* TEX. R. APP. P. 33.1(a)(2) (as prerequisite to presenting complaint for appellate review, record must show that trial court ruled or refused to rule on objection). Second, we may not reverse a judgment on the ground that the trial court made an error of law unless we conclude that the error complained of "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a). Here, the trial court's final judgment was rendered on the grounds that Tenant established its cause of action under the property code as a matter of law and Landlord's pleadings were stricken for failure to comply with the trial court's orders. Consequently, even if the trial court initially erred by denying summary judgment on the ground that Cruz lacked capacity, that error did not cause the rendition of an improper judgment. *See id.* We decide Landlord's second issue against it.

5. Tenant's motion for summary judgment

Tenant sought summary judgment on its cause of action under Chapter 93 of the Property Code. In its third issue, Landlord contends the trial court erred by

granting Tenant's motion. Chapter 93 establishes two distinct causes of action for a commercial tenant seeking the return of its security deposit. *See* TEX. PROP. CODE § 93.011; *EDG Prop. Mgmt., Inc. v. Ratnani*, 279 S.W.3d 905, 907 (Tex. App.—Dallas 2009, no pet.). The first cause of action involves the landlord's bad faith retention of the security deposit. TEX. PROP. CODE § 93.011(a). The second cause of action involves the landlord's bad faith failure to account for the security deposit. TEX. PROP. CODE § 93.011(b). If the tenant shows that the landlord failed to timely provide a refund of the security deposit or an accounting, then it is presumed that the landlord acted in bad faith. TEX. PROP. CODE § 93.011(d); *FP Stores, Inc. v. Tramontina US, Inc.*, 513 S.W.3d 684, 693 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

In both its operative pleading and its summary judgment motion, Tenant alleged that it had established all elements of its cause of action under Property Code chapter 93:

- Tenant leased the premises from Landlord as set out in the lease;
- Tenant paid Landlord the security deposit of $3,500 at the start of the lease term;
- At the conclusion of the lease term, Tenant did not owe Landlord any rent;
- Tenant requested return of the security deposit in writing and Landlord received the request;
- Landlord did not return the deposit or any portion of it; and

- Landlord did not provide Tenant a written description and itemized list of deductions within the statutory time period.

See TEX. PROP. CODE §§ 93.005(a) (landlord's obligation to refund security deposit); 93.006(c) (landlord's obligation to provide description and itemized list of deductions); 93.009 (tenant's provision of forwarding address); 93.011 (liability of landlord). Tenant offered summary judgment evidence on each element. Consequently, Tenant met its summary judgment burden. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (movant must establish entitlement to summary judgment on issues expressly presented to trial court by conclusively proving all essential elements of his cause of action as a matter of law).

Landlord contends it controverted each of Tenant's material facts, so summary judgment was not proper. But because Landlord's answer was stricken, the facts pleaded by Tenant, except for any unliquidated damages, were deemed admitted. *See Paradigm Oil, Inc.*, 372 S.W.3d at 183 ("the non-answering party in a no-answer default judgment is said to have admitted both the truth of facts set out in the petition and the defendant's liability on any cause of action properly alleged by those facts"). And in any event, the record reflects that Landlord's allegations that Tenant damaged the premises were not communicated to Tenant within the statutory time frame for returning the security deposit. *See* TEX. PROP. CODE § 93.005(a) (landlord shall refund security deposit not later than 60th day after date tenant surrenders premises and provides notice of forwarding address to landlord or

landlord's agent); *id.* § 93.011(d) (landlord who fails to return security deposit or provide written description and itemized list of deductions on or before 60th day after the date the tenant surrenders possession is presumed to have acted in bad faith).

Similarly, we reject Landlord's contention that summary judgment for Tenant was not proper because Tenant did not negate Landlord's counterclaim. Landlord counterclaimed for damages for a "period of holdover" caused by Tenant's leaving "some of its personal properties in the leased premises," removal of permanent fixtures, and damage to the premises caused by removal of a chimney furnace. Like Landlord's defenses, Landlord's counterclaim was stricken when the trial court struck its answer and did not preclude summary judgment for Tenant. *See* TEX. R. CIV. P. 215.2(b)(5) (trial court may strike pleadings as sanction for failure to obey order to provide discovery).

Landlord argues that at the time the trial court ruled on Tenant's motion for summary judgment, it had not yet stricken Landlord's answer. But even if the trial court had denied Tenant's motion instead of granting it on February 1, 2019, it could have reconsidered and granted the motion three weeks later when it struck Tunad's answer and rendered final judgment. Consequently, the trial court's ruling did not cause the rendition of an improper judgment warranting reversal. TEX. R. APP. P. 44.1(a)(1) ("No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error

complained of . . . probably caused the rendition of an improper judgment . . . .”). We decide Landlord’s third issue against it.

CONCLUSION

The trial court’s judgment is affirmed.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

190497F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TUNAD ENTERPRISES INC., Appellant No. 05-19-00497-CV V. MARTIN PALMA D/B/A LIZ PIZZA, Appellee	On Appeal from the 417th Judicial District Court, Collin County, Texas Trial Court Cause No. 417-00618-2016. Opinion delivered by Justice Osborne. Justices Whitehill and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Martin Palma d/b/a Liz Pizza recover his costs of this appeal from appellant Tunad Enterprises Inc.

Judgment entered June 22, 2020